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Supreme Court, U.S.
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No. 09-279

In The

Supreme Court of the United States

TOMMY B. ROBERTSON,

Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. The Anonymous Informant's Personal Knowledge and Credibility or Reliability Had Not Been Established. And, Despite a Three-Day Surveillance, the Affiant Merely Corroborated Innocent Aspects of the Informant's Information. Did the Trial Court Properly Quash the Search Warrant?

II. Did the Michigan Court of Appeals Err in Finding that the Good-Faith Exception to the Exclusionary Rule Supported Execution of the Search Warrant, Where the People's Unpreserved Claim Turned on *Unresolved* Factual Determinations and the Warrant Application Was Supported by Nothing More than a "Bare Bones" Affidavit?

III. Less than Five Minutes after the Affiant Conducted the Pre-Raid Surveillance, He Returned with His Crew to Execute the Search Warrant. Was the Pre-Raid Surveillance Inextricably Intertwined with the Search Warrant-Execution and Not Sufficiently Distinguishable from the Illegal Warrant to Be Purged of its Primary Taint?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES vii

OPINION AND JUDGMENT BELOW..... 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED.... 1

STATEMENT OF THE CASE..... 2

REASONS FOR GRANTING THE PETITION..... 6

I. THE TRIAL COURT PROPERLY QUASHED THE SEARCH WARRANT WHERE: (A) THE ANONYMOUS INFORMANT'S PERSONAL KNOWLEDGE AND CREDIBILITY OR RELIABILITY HAD NOT BEEN ESTABLISHED; (B) DESPITE A THREE-DAY SURVEILLANCE, THE AFFIANT-POLICE OFFICER DID NOT SEE ANY NARCOTICS ON THE PREMISES AND DID NOT CORROBORATE THE ANONYMOUS INFORMANT'S INFORMATION; AND (C) THE PROBABLE CAUSE-DETERMINATION WAS PREMISED, IN PART, ON ROBERTSON'S STALE ARRESTS 7

A. Paragraph One Pointed up the Affiant's Inexperience in Conducting Controlled Buys 9

TABLE OF CONTENTS – Continued

Page

B. Paragraph Two Makes Clear That the Anonymous Informant *Had No Personal Knowledge* of Illegal Drug Activity... 9

C. Paragraph Three Merely Corroborated Innocent Aspects of the Anonymous Informant's Information..... 11

D. Paragraph Four Merely Corroborated Innocent Aspects of the Anonymous Informant's Information 12

E. Paragraph Five Again Merely Corroborated Innocent Aspects of the Anonymous Informant's Information..... 15

F. Paragraph Six Continues in the Corroboration of Innocent Facts..... 16

G. Paragraphs Seven, Eight and Nine Attempt to Shore up the Weaknesses in the Affidavit with Allegations of Robertson's Stale Arrests 17

H. Paragraph Ten Recites a Past Complaint of Drug Sales at a Different Address, by *Unknown Males, at Some Unknown Date and Time* 18

I. Paragraph Eleven Merely Corroborated a Public Fact 18

J. Paragraph Twelve Alleges the *Affiant's Belief* as to the Existence of Probable Cause 19

TABLE OF CONTENTS – Continued

Page

K. The Final Paragraph Merely Recites the Affiant's Experience While Conducting Other Narcotic Raids 19

ARGUMENT SUMMARY 20

II. THE GOOD-FAITH EXCEPTION IS INAPPROPRIATE WHERE THE MAGISTRATE WAS MISLED BY THE AFFIANT'S DELIBERATELY OR RECKLESSLY FALSE INFORMATION. IN FAILING TO CHALLENGE THE DEFENSE-ALLEGATION THAT THE AFFIDAVIT CONTAINED FALSE AND MISLEADING INFORMATION, THE PEOPLE FORFEITED THIS CLAIM ON APPEAL. THE EXCEPTION IS ALSO INAPPROPRIATE BECAUSE THE WARRANT WAS SUPPORTED BY A "BARE BONES" AFFIDAVIT. THE COURT OF APPEALS ERRED REVERSIBLY IN HOLDING THIS EXCEPTION SUPPORTED THE WARRANT'S EXECUTION 22

A. The People's Unpreserved Good-Faith Exception Claim Turned on *Unresolved* Factual Determinations, *i.e.*, Was the Magistrate Misled by the Deliberate or Recklessly False Information That Robertson Was Arrested and Found with Drugs and a Gun on August 1, 2005 23

TABLE OF CONTENTS – Continued

Page

B. In Addition, the Good-Faith Exception Has No Application Because the Warrant Was Supported by Nothing More than a "Bare Bones" Affidavit 26

C. In Failing to Challenge the Defense-Allegation That the Affidavit Contained False and Misleading Information, the People Forfeited this Claim on Appeal 28

III. LESS THAN FIVE MINUTES AFTER OFFICER PACE CONDUCTED THE PRE-RAID SURVEILLANCE, HE RETURNED WITH HIS CREW TO EXECUTE THE SEARCH WARRANT. THE PRE-RAID SURVEILLANCE WAS INEXTRICABLY INTERTWINED WITH THE SEARCH WARRANT-EXECUTION AND WAS NOT SUFFICIENTLY DISTINGUISHABLE FROM THE ILLEGAL WARRANT TO BE PURGED OF ITS PRIMARY TAINT 30

CONCLUSION 32

APPENDIX

December 23, 2008 Michigan Court of Appeals Opinion and Judgment ..... App. 1

August 3, 2007 Third Judicial Circuit Court Order of Dismissal ..... App. 10

August 24, 2007 Third Judicial Circuit Court Order Denying Motion for Reconsideration .... App. 13

TABLE OF CONTENTS – Continued

Page

June 3, 2009 Michigan Supreme Court Order Denying Leave to Appeal ..... App. 14

U.S. Const. Am. IV ..... App. 15

August 3, 2007 Transcript Excerpts of Third Judicial Circuit Court Ruling ..... App. 16

December 6, 2006 Affidavit for Search Warrant ..... App. 20

December 6, 2006 Search Warrant ..... App. 25

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509 (1964) 7, 8, 26

Denius v. Dunlap, 330 F.3d 919 (7th Cir. 2003) 13

Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978) 17, 23

Hudson v. Michigan, 547 U.S. 586, 126 S.Ct. 2159 (2006) 31

Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1987) 7, 8

Recznik v. City of Lorain, 393 U.S. 166, 89 S.Ct. 342 (1968) 16

Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584 (1969) 7, 8

United States v. Baxter, 889 F.2d 731 (6th Cir. 1989) 17, 18

United States v. Danhauer, 229 F.3d 1002 (10th Cir. 2000) 14, 15, 19

United States v. DeQuasie, 373 F.3d 509 (4th Cir. 2004) 21

United States v. Gibson, 928 F.2d 250 (8th Cir. 1991) 14, 19

United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984) 8, 22, 23

United States v. Olano, 507 U.S. 725, 113 S.Ct. 1770 (1993) 29

TABLE OF AUTHORITIES – Continued

Page

United States v. Phillips, 287 F.3d 1053 (11th Cir. 2002) 13

United States v. Taylor, 985 F.2d 3 (1st Cir. 1993) 10

United States v. Traylor, 656 F.2d 1326 (9th Cir. 1981) 21

United States v. Vargas, 931 F.2d 112 (1st Cir. 1991) 12

United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741 (1965) 8

United States v. Weaver, 99 F.3d 1372 (6th Cir. 1996) 27

United States v. Young, 470 U.S. 1, 105 S.Ct. 1038 (1985) 30

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) 31

STATE CASES

Marshall Lasser, PC v. George, 252 Mich.App. 104 (2002) 29

People v. Broilo, 58 Mich.App. 547 (1975) 10

People v. Brown, 132 Mich.App. 128 (1984) 8

People v. Carines, 460 Mich. 750 (1999) 29

People v. Effelberg, 220 Mich. 528 (1922) 19

People v. Goldston, 470 Mich. 523 (2004) 23

People v. Hellstrom, 264 Mich.App. 187 (2004) 9

TABLE OF AUTHORITIES – Continued

Page

People v. Houston, 237 Mich.App. 707 (1999) ...24, 25, 26

People v. Randolph, 4 P.3d 477 (2000) 27

OTHER AUTHORITIES

28 U.S.C. § 1257(a) 1

Fed. R. Evid. 201 13

Fed. R. Evid. 201(b)(2).....13

J. Maguire, Evidence of Guilt 221 (1959) 31

MCL § 771.3; MSA 28.1133 25

Mapquest of 8552 Grand River Avenue, Detroit, Michigan 13

Merriam-Webster Online Dictionary (2009).....11

Michigan Court Rule 2.119(C)(2)(b).....24

U.S. Const. Am. IV.....7, 21

Wikipedia Encyclopedia, available at http://en.wikipedia.org/wiki/Grand_River_Avenue 13

OPINION AND JUDGMENT BELOW

Petitioner seeks review of a final judgment entered by a state court of last resort, to wit: the Michigan Supreme Court's Order dated June 3, 2009, denying petitioner leave to appeal the December 23, 2008 decision of the Michigan Court of Appeals, reversing the Wayne County Circuit Court's dismissal order and remanding for reinstatement of the charges. (Michigan Supreme Court Chief Justice Kelly and Justice Cavanagh dissented, and would have granted leave to appeal.)

The Michigan Supreme Court's published order is reported at 483 Mich. 1032 (2009) and reprinted in the Appendix ("App.") at 14. The Court of Appeals unpublished opinion is unofficially reported at 2008 WL 5382919 and reprinted at App. 1-9.

STATEMENT OF JURISDICTION

The statute conferring jurisdiction on this Court to review on writ of certiorari the judgment in question is 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution is reprinted at App. 15.

STATEMENT OF THE CASE

This case arises out of the execution of a search warrant at Tommy Robertson's clothing store in the early afternoon of December 7, 2006. The warrant was issued on December 6, 2006 authorizing a search of "the entire premises and curtilage known as 8552 Grand River, Slick's Fashion Design and Novelties store . . . a 2 story commercial building . . . within the City of Detroit." The issuing magistrate also authorized the search of Tommy Robertson, who was referenced in the affidavit as "seller #1," along with the search of seller #2, described as a black male, 35 to 40 years old, "6', slim built, dark complexion." App. 25.

Just before 2:15 p.m., Officer Lindsay Pace went to the store to conduct a pre-raid surveillance. (T, 6, 16; 2/13/07). He went inside, looked around as though he was shopping for clothes. (T, 7; 2/13/07). The officer testified he was "in the store maybe five minutes" when he saw Tommy Robertson leave an office in the rear and walk past him. (T, 7, 27; 2/13/07). Tommy Robertson then reportedly "approached one of the gentlemen . . . standing at the front. . . . removed what appeared to be a nickel plated automatic from his waist and passed it to one of the guys at the door. . . ." This man was later identified as Nathaniel Jones. (T, 8-9; 2/13/07). Officer Pace said he saw the barrel of the gun as Jones positioned it in his waistband. (T, 18; 2/13/07).

Mr. Robertson left the store and Officer Pace immediately transmitted notice to his crew. He testified, "I didn't tell anybody he had a gun but I notified my close undercovers that the target had left." (T, 22; 2/13/07). The police did not apprehend Mr. Robertson or bring him back to the store. (T, 16; 2/13/07). Officer Pace left and, "probably less than five minutes" later, returned with his raiding crew for the execution of the search warrant. (T, 16, 29; 2/13/07).

The officers found no drugs during the search. The gun Tommy Robertson allegedly passed was found lying on the floor near Nathaniel Jones. (T, 29; 2/13/07). Everyone on the premises was detained, *viz.*, Nathaniel Jones, a female, another male and Tracey Robertson. (T, 19, 20; 2/13/07). When asked whether the detainees had also been taken to the police station, the prosecution's relevancy-objection was sustained. (T, 20; 2/13/07).

Later that same day, *i.e.*, December 7, 2006, Officer Pace returned to the store "because one of the [crew] members had left [a] camera inside. . . ." (T, 22; 2/13/07). Although he spoke to Tommy Robertson who had since returned, Officer Pace made no attempt to have him placed under arrest. (T, 22-24; 2/13/07).

The next day, December 8, 2006, the People charged Nathaniel Jones and Tracey Robertson with carrying a concealed weapon, felon in possession of a firearm and felony firearm. Officer Pace testified he "knew" that Tommy Robertson "wasn't charged on the

date that we locked up the other two Defendants." (T, 25; 2/13/07).

Soon thereafter, Tommy Robertson filed a complaint against Officer Pace and his crew with the Internal Affairs Section of the Detroit Police Department. (T, 27; 2/13/07). The officer testified it had been less than two weeks before February 13, 2007 that he had received notice of Robertson's Internal Affairs-complaint. (T, 28; 2/13/07). In response to defense counsel's question as to whether "it was after he went to Internal Affairs that you . . . sought this warrant . . . ?" Officer Pacer said, "I have no idea." (T, 27; 2/13/07).

On January 24, 2007, almost two months after the December 7, 2006-raid, the People charged Tommy Robertson with the offenses of felon in possession of a firearm and felony firearm. Following a preliminary examination, Tommy Robertson was bound over to circuit court. (T, 32-33; 2/13/07).

On March 20, 2007, Tommy Robertson filed motions to quash the search warrant and to conduct a *Franks* hearing and to suppress the evidence. The motions contended that the search warrant affidavit contained allegations that were deliberately false or made in reckless disregard for the truth, and were accompanied by an offer of proof: Robertson was neither arrested nor found in possession of cocaine, heroin or a firearm on August 1, 2005. The motions were noticed for hearing the following Tuesday, *viz.*,

March 27, 2007. However, because of a number of adjournments, the hearing was not held until almost four months later on August 3, 2007.

The People did not file a written response to the motions "at least 3 days before the [March 27, 2007] hearing . . . " as provided by Michigan Court Rule 2.119(C)(2)(b). And, despite the 129-day delay in holding the hearing, the People never attempted to controvert Robertson's offer of proof that "the allegation in paragraph 7 of the affidavit is false."

At the hearing on August 3, 2007, the People *did not* argue that the good-faith exception was a ground for upholding the search warrant, or that Robertson's two stale arrests supported the magistrate's probable cause finding. The trial court quashed the search warrant and dismissed the case. App. 10-11, 18-19.

On August 7, 2007, the People moved for reconsideration of the dismissal-orders, contending that Officer Pace's observations of the defendants' possession of guns were independent of the search warrant. However, no argument was advanced that the good-faith exception was a ground for upholding the search warrant. The motion was subsequently denied on August 24, 2007. App. 13.

The People appealed as of right to the Michigan Court of Appeals, arguing for the first time that the good-faith exception supported the warrant's execution. The Court of Appeals acknowledged the claim was unpreserved but held, "This Court may consider an unpreserved question of law where the facts

necessary for its resolution have been presented." App. 6-7. On December 23, 2008, the Court of Appeals reversed the circuit court orders and remanded for reinstatement of the charges. App. 2, 9.

Petitioner thereafter sought leave to appeal to the Michigan Supreme Court. The application was denied in an order dated June 3, 2009. Chief Justice Kelly and Justice Cavanagh dissented, however, and would have granted leave to appeal. App. 14.

REASONS FOR GRANTING THE PETITION

This Court should grant a writ of certiorari because the Michigan appellate courts have decided an important Federal Constitutional question in a way that conflicts with relevant decisions of this Court and of various Circuits of the United States Court of Appeals, as set forth *infra*.

Alternatively, certiorari is appropriate because the Michigan courts have decided important questions of Federal Constitutional law that should be settled by this Court: Were the affiant's observations while conducting the pre-raid surveillance, only moments before the execution of the search warrant, inextricably intertwined with the search warrant-execution? Was the pre-raid surveillance not sufficiently distinguishable from the illegal warrant to be purged of its primary taint?

The issues are of fundamental importance not just to Petitioner Tommy B. Robertson, but to countless other defendants who will find themselves in similar straits. If the decision below is allowed to stand, the proscription against unreasonable searches and seizures, as guaranteed by the Fourth Amendment, will be a hollow one.

I. THE TRIAL COURT PROPERLY QUASHED THE SEARCH WARRANT WHERE: (A) THE ANONYMOUS INFORMANT'S PERSONAL KNOWLEDGE AND CREDIBILITY OR RELIABILITY HAD NOT BEEN ESTABLISHED; (B) DESPITE A THREE-DAY SURVEILLANCE, THE AFFIANT-POLICE OFFICER DID NOT SEE ANY NARCOTICS ON THE PREMISES AND DID NOT CORROBORATE THE ANONYMOUS INFORMANT'S INFORMATION; AND (C) THE PROBABLE CAUSE-DETERMINATION WAS PREMISED, IN PART, ON ROBERTSON'S STALE ARRESTS.

A search warrant may issue only on a showing of probable cause, supported by oath or affirmation. U.S. Const. Am. IV. In *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317 (1987), this Court abandoned the two-pronged *Aguilar-Spinelli* test,[1] in favor of making

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[1] After *Gates*, Michigan courts continued to follow *Aguilar-Spinelli* in accord with the higher standards set by the Michigan Constitution, absent other directions from the Michigan Supreme

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probable cause-determinations based on the "totality of the circumstances."

Under a "totality of the circumstances" approach, the reviewing court must assess the adequacy of an affidavit in terms of "veracity" and "basis of knowledge." The affidavit must indicate some of the underlying circumstances establishing that the informant was credible or that his information was reliable ("veracity"), *id.* at 229, and must show some of the underlying circumstances from which the informant or affiant came by his information and drew his conclusions ("basis of knowledge"), *id.* at 228.

A judicial officer must act as a neutral and detached magistrate in authorizing a search warrant, "and not serve merely as a rubber stamp for the police." *United States v. Ventresca*, 380 U.S. 102, 109, 85 S.Ct. 741, 746 (1965). As such, "[d]eference to the [issuing] magistrate . . . is not boundless." *United States v. Leon*, 468 U.S. 897, 914, 104 S.Ct. 3405, 3416 (1984).

Court. *People v. Brown*, 132 Mich.App. 128 (1984). *Aguilar-Spinelli* required that an affidavit based on hearsay information set forth some of the underlying circumstances from which the informant concluded that contraband was located in that place and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, was credible or his information reliable. *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584 (1969).

Here, there was nothing in the search warrant affidavit from which the magistrate could find there was a substantial basis that narcotics and other evidence of a crime could be found at Tommy Robertson's clothing store. Reading the search warrant averments separately and as part of a connected whole demonstrates the absence of probable cause.

A. Paragraph One Pointed up the Affiant's Inexperience in Conducting Controlled Buys

The affiant recounts his police experience in paragraph one. App. 20. While an officer's "training and experience" may be considered in determining probable cause, it cannot substitute for the lack of an evidentiary nexus between Robertson's clothing store and the alleged drug activity. *People v. Hellstrom,* 264 Mich.App. 187, 200 n. 7 (2004). Aside from highlighting the critical shortcoming in Officer Pace's drug enforcement experience, *i.e.,* he had only been involved in about five controlled buys, paragraph one offered no information helpful to the magistrate's probable cause determination.

B. Paragraph Two Makes Clear That the Anonymous Informant *Had No Personal Knowledge* of Illegal Drug Activity

The affiant states in paragraph two that an anonymous caller told him that "individuals would

exit their cars and enter the front door of the business. . . . stay a short period of time and then leave. . . ." The anonymous informant told the affiant these individuals would go to the rear of the location and exchange money for *unknown items*. App. 20-21.

The reference to the exchange of monies for *unknown items* makes it eminently clear that the anonymous informant had no personal knowledge of illegal drug activity. The use of the general descriptive, "drugs," instead of a specific identification of the narcotics allegedly being sold, is another indicator that the anonymous informant's information was based on rumors, suspicions or beliefs. *United States v. Taylor,* 985 F.2d 3, 6 (1st Cir. 1993) (in determining whether information from an informant provides probable cause to issue a search warrant, the informant's credibility is enhanced to the extent the provided information indicates first-hand knowledge).

When the allegations in paragraph two are read in a commonsense and realistic manner, it is clear they do not buttress the magistrate's probable cause finding. Because the object of the search was an urban retail clothing store, "there must be something more than the mere fact that people were coming and going in order to give reasonable cause to believe" that criminal activity was occurring and continuing. *People v. Broilo,* 58 Mich.App. 547, 551 (1975).

C. Paragraph Three Merely Corroborated Innocent Aspects of the Anonymous Informant's Information

The affiant states in paragraph three that he set up surveillance on November 28, 2006 where he observed several individuals enter the store within a thirty-minute period. "The individuals would go to the rear . . . with the above sellers and stay a short time," and then leave without purchasing items on display. One of these individuals, he said, left the store carrying a large blue plastic bag that seller #1 handed him. App. 21.

A common definition of the word several is "more than two but fewer than many."[2] Again, the fact that several individuals entered and exited the premises within a thirty-minute period in no way supports a probable cause-finding that evidence of a crime would be found at this retail clothing store. The same must also be said of the allegation that no items on display were purchased: shoppers often enter stores and leave without making purchases.

Further, a commonsense reading of the allegation that after going to the rear of the store, one of the shoppers left carrying a large blue plastic bag, offers nothing to the magistrate's probable cause finding. It is commonplace for store proprietors to keep

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[2] *Merriam-Webster Online Dictionary* (2009) located at http://www.merriam-webster.com/dictionary/several (last visited August 17, 2009).

inventory, and especially select-inventory, along with items that have been placed on layaway, in the rear. Moreover, because items of clothing are typically bulky in nature, they require packaging in large bags.

Under these circumstances, there was nothing from which the issuing magistrate could conclude that there was a fair probability that contraband or evidence of a crime would be found. *United States v. Vargas,* 931 F.2d 112, 114 (1st Cir. 1991) (with an anonymous source, subsequent corroboration is often critical in order to produce evidence that can support or refute the unknown informant's claim and to determine its reliability).

D. Paragraph Four Merely Corroborated Innocent Aspects of the Anonymous Informant's Information

Paragraph four again recounts the affiant's observations regarding individuals entering and leaving the store on November 29, 2006. The affiant then describes seeing an Arabic male walk to the store, and speak briefly to the suspects at the front door. Both suspects reportedly went to the rear of the store with the Arabic male. Seller #2 then handed the Arabic male a large green and white plastic bag, after retrieving it from a small room. The Arabic male then walked west on Grand River to Heritage where he left the area in a white vehicle that was occupied by three black males. App. 21-22.

Pursuant to Fed. R. Evid. 201, Robertson asks this court to take judicial notice of the geographical position of Slick's Fashion Design and Novelties store, located at 8552 Grand River Avenue, Detroit, Michigan. Rule 201(b)(2) provides that judicially noticed facts must be those "not subject to reasonable dispute" because they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Under subsection (f), judicial notice may be taken at any stage of the proceeding.

See Denius v. Dunlap, 330 F.3d 919, 926 (7th Cir. 2003) (district court abused its discretion in refusing to take judicial notice of medical records of military personnel on National Personnel Records Center's web site, as it was not subject to reasonable dispute); *United States v. Phillips,* 287 F.3d 1053, n. 1 (11th Cir. 2002) (judicial notice taken of 1990 census).

Grand River Avenue is a major thoroughfare where parking space is likely to come at a premium.[3] As the map of the area shows, Heritage Place is in very close proximity to the clothing store.[4] While a

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[3] Grand River Avenue is one of the five major avenues extending from downtown Detroit in differing directions. Wikipedia Encyclopedia, available at http://en.wikipedia.org/wiki/Grand_River_Avenue (last visited August 16, 2009).

[4] Mapquest of 8552 Grand River Avenue, Detroit, Michigan, available at http://www.mapquest.com/maps?city=Detroit&state=MI&address=8552+Grand+River+Avenue (last visited August 16, 2009).

driver waiting for the Arabic male may not have found a parking space immediately in front of the store, a space may have been available at the nearby corner of Heritage Place and Grand River Avenue. Under such circumstances, a commonsense and realistic reading of this allegation, adds nothing to the probable cause-determination.

Despite the fixed surveillance, there were no drugs seized from the Arabic male or from any other shopper leaving the clothing store. Nor did the affiant gain information about the Arabic male or any other shoppers or their vehicles. Contrary to the People's argument below, the mere corroboration of innocent information about the defendants does not establish the informant's reliability. *See United States v. Gibson*, 928 F.2d 250, 253 (8th Cir. 1991) (no probable cause provided by an affidavit based on an anonymous tip, albeit one rich in particulars, where police investigation corroborated only innocent details and found nothing suspicious).

The decision in *United States v. Danhauer*, 229 F.3d 1002 (10th Cir. 2000) is instructive on this point. There, the Court held that probable cause for the issuance of a warrant to search the defendants' home was not established where there was corroboration of suspicious and innocent aspects of the confidential informant's information, but no information revealing the informant's basis of knowledge or reliability. The confidential informant merely advised the police that the defendants were cooking methamphetamine in a large garage located at the rear of their property.

In *Danhauer,* the corroboration consisted of: a records check revealing that the defendants occupied the premises in question; police observation of one of the defendants going back and forth between the house and the garage; a criminal background check revealing that both defendants had criminal histories for dangerous drugs, possession of paraphernalia, assault, forgery, and criminal mischief; outstanding arrest warrants for both defendants; and a positive test for the presence of methamphetamine and opiates on the part of one of the defendants when she appeared for her probation report, on an attempted forgery conviction, the day before the warrant was issued.

E. Paragraph Five Again Merely Corroborated Innocent Aspects of the Anonymous Informant's Information

The affiant continued in the corroboration of innocent aspects of the anonymous informant's information in paragraph five, *i.e.,* he saw individuals entering and leaving the store on December 5, 2006. The affiant concluded with the bald assertion that the anonymous tipster told him the "sellers only sell to customers that are known." App. 22. Again, for the reasons previously discussed, the corroboration of the innocent aspects of the anonymous tipster's information contributed nothing to the magistrate's probable cause inquiry.

Moreover, paragraph five is devoid of allegations that the affiant had demonstrated the informant's credibility and reliability through further substantive investigation, such as conducting "controlled buys." It was simply not enough for the anonymous informant to have given information that Robertson was selling narcotics from his store. There was no substantial basis here from which the magistrate could have concluded that the police had demonstrated probable cause. *Recznik v. City of Lorain,* 393 U.S. 166, 89 S.Ct. 342 (1968).

F. Paragraph Six Continues in the Corroboration of Innocent Facts

Paragraph six recites that on each occasion the affiant observed the suspects standing in front of the store's window, then going to the rear when shoppers entered. App. 22. Here, the affiant had no evidence that *anyone* had ever seen narcotics in the store. Paragraph six, like the entire affidavit, merely invited the magistrate to speculate that the suspects kept drugs on the premises. The evidence was insufficient for the magistrate to have found there was a substantial basis that drugs were on the premises.

G. Paragraphs Seven, Eight and Nine Attempt to Shore up the Weaknesses in the Affidavit with Allegations of Robertson's Stale Arrests

In paragraph seven, the affiant swore that Tommy Robertson had been arrested in August 2005 and found in possession of heroin, cocaine and firearms. App. 22-23. However, in moving to quash the warrant, Robertson maintained that this allegation was false. He also moved for a hearing pursuant to *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674 (1978) arguing, "the search warrant contains deliberate or reckless false statements material to the finding of probable cause. . . . He was not arrested on that date nor was he found in possession of cocaine, heroin or a firearm." The affiant then recites in paragraph numbers eight and nine Robertson's arrests in 2004. App. 23.

Both the affiant and magistrate seemingly believed that allegations of Robertson's stale arrests, in 2004 and 2005 at other locations, automatically established probable cause for the search of his business on December 6, 2006. However, the mere corroboration of the suspect's criminal record does not establish the reliability of an anonymous tipster. *United States v. Baxter,* 889 F.2d 731, 733 (6th Cir. 1989).

H. Paragraph Ten Recites a Past Complaint of Drug Sales at a Different Address, by *Unknown Males, at Some Unknown Date and Time*

The affiant states in paragraph ten that a data base check revealed a "dope complaint" at *8500* Grand River Avenue. According to this averment, a presumably anonymous informant, had complained at some *unknown date and time*, that some *unknown black males* had sold narcotics from premises other than Robertson's clothing store. App. 23. Thus, there is a noticeable absence of an evidentiary nexus between Robertson's clothing store and the complaint of unknown origin, date and time in this averment. This paragraph clearly offered nothing to further the magistrate's conclusion that a substantial basis existed to authorize the search.

I. Paragraph Eleven Merely Corroborated a Public Fact

In paragraph number eleven, the affiant states that a check of public records revealed that the store in question was registered to Tommy Robertson. App. 23. Again, the mere corroboration of public facts and innocent information about a suspect does not establish the informant's reliability. *Baxter*, at 733. The Eighth Circuit similarly found no probable cause was provided by an affidavit based on an anonymous tip, albeit one rich in particulars, where police investigation corroborated only innocent details and

found nothing suspicious. *Gibson*, at 253. *See also, Danhauer*.

J. Paragraph Twelve Alleges the *Affiant's Belief* as to the Existence of Probable Cause

In paragraph twelve, the affiant completely misconstrued the warrant requirement by asserting his belief as to the existence of probable cause. App. 23. The question was *not* whether the *affiant* had probable cause to believe narcotics would be found on the premises, but whether there was a substantial basis for the *magistrate's conclusion* that there was a "fair probability that contraband or evidence of a crime [would] be found in a particular place." Put simply, it is not for the affiant to draw his own inferences; but instead, he must state matters which justify the drawing of them. The affiant's belief as to the existence of probable cause was thus surplusage and irrelevant. *People v. Effelberg*, 220 Mich. 528, 531 (1922).

K. The Final Paragraph Merely Recites the Affiant's Experience While Conducting Other Narcotic Raids

In the final paragraph, the affiant states that in the overwhelming majority of the raids he was involved in, illegal firearms were found. App. 24. Again, though the affiant's experience may be relevant to a probable cause determination, it cannot substitute for

the lack of an evidentiary nexus between Robertson's clothing store and the alleged drug activity.

ARGUMENT SUMMARY

The search warrant was clearly constitutionally defective because there was no probable cause to search the business premises located at 8552 Grand River Avenue. Despite conducting a three-day fixed surveillance, the affiant did not see any narcotics on the premises and had no evidence that *anyone* had ever seen narcotics in the store. The affiant did not seize narcotics from any of the shoppers leaving the clothing store and did not otherwise acquire any information to corroborate the anonymous informant's information.

Contrary to the People's argument below, the mere corroboration of public facts and innocent information about the defendants does not establish the informant's reliability. Further, evidence of Robertson's stale arrests did not rise to probable cause.

In reversing the circuit court's finding that the affidavit was insufficient to establish probable cause, the Michigan Court of Appeals stated:

> Evidence from an informant that a specific person was selling drugs from a particular place, plus evidence of apparent narcotic transactions involving that person at that place corroborating observations of the informant, provides a substantial basis for

> concluding that drugs would be found at the place to be searched. App. 5.

This holding was clearly erroneous.

Where an informant is mentioned in a search warrant affidavit, and there is not sufficient independent corroboration of the informant's information, the affidavit must demonstrate the informant's veracity and basis of knowledge. *See also,* U.S. Const. Am. IV; *United States v. DeQuasie*, 373 F.3d 509 (4th Cir. 2004); *United States v. Traylor,* 656 F.2d 1326 (9th Cir. 1981).

The affidavit in this case failed to present the requisite attestation of the informant's reliability and failed to present sufficient evidence to establish a substantial basis for the magistrate's conclusion that it was probable that evidence of a crime would be found.

II. THE GOOD-FAITH EXCEPTION IS INAPPROPRIATE WHERE THE MAGISTRATE WAS MISLED BY THE AFFIANT'S DELIBERATELY OR RECKLESSLY FALSE INFORMATION. IN FAILING TO CHALLENGE THE DEFENSE-ALLEGATION THAT THE AFFIDAVIT CONTAINED FALSE AND MISLEADING INFORMATION, THE PEOPLE FORFEITED THIS CLAIM ON APPEAL. THE EXCEPTION IS ALSO INAPPROPRIATE BECAUSE THE WARRANT WAS SUPPORTED BY A "BARE BONES" AFFIDAVIT. THE COURT OF APPEALS ERRED REVERSIBLY IN HOLDING THIS EXCEPTION SUPPORTED THE WARRANT'S EXECUTION.

In *Leon*, this Court held that the exclusionary rule can be modified so as not to bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective. *Id.* at 905. There are, however, four situations where the good-faith reliance exception is inappropriate. First, if the issuing magistrate "was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." Second, if "the issuing magistrate wholly abandoned his judicial role. . . ." Third, if the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," or in other words, where "the warrant application was supported by [nothing] more than a 'bare bones' affidavit. . . ."

Fourth, if the "warrant [was] so facially deficient – *i.e.,* failing to particularize the place to be searched or the things to be seized. . . ." *Id.* at 915, 923. *People v. Goldston,* 470 Mich. 523, 530-531 (2004).

A. The People's Unpreserved Good-Faith Exception Claim Turned on *Unresolved* Factual Determinations, *i.e.*, Was the Magistrate Misled by the Deliberate or Recklessly False Information That Robertson Was Arrested and Found with Drugs and a Gun on August 1, 2005.

On March 20, 2007, Tommy Robertson filed motions to quash the search warrant and to conduct a *Franks* hearing and to suppress the evidence.

The motions contended that the search warrant affidavit contained allegations that were deliberately false or made in reckless disregard for the truth, and were accompanied by an offer of proof: Robertson was neither arrested nor found in possession of cocaine, heroin or a firearm on August 1, 2005.

The motions were noticed for hearing the following Tuesday, *viz.,* March 27, 2007. However, because of a number of adjournments, the hearing was not held until almost four months later on August 3, 2007. The People did not file a written response to the motions "at least 3 days before the [March 27, 2007] hearing . . . " as provided by

Michigan Court Rule 2.119(C)(2)(b). And, despite the 129-day delay in holding the hearing, the People never attempted to controvert Robertson's offer of proof that "the allegation in paragraph 7 of the affidavit is false."

What is more, at the August 3, 2007 hearing and in its subsequent reconsideration-motion, the People *never* argued that the good-faith exception was a ground for upholding the search warrant, apparently recognizing that the affiant's deliberate or recklessly false statement precluded application of the doctrine.[5] The People thereafter argued for the first time on appeal that the search warrant affidavit did not contain any false or misleading information.

After acknowledging the claim was unpreserved because no such argument was raised in the trial court, the Court of Appeals erroneously found the good-faith exception supported the warrant's execution. Quoting *People v. Houston*, 237 Mich.App. 707 (1999), the Court stated, "This Court may consider an unpreserved question of law where the facts necessary for its resolution have been presented." App. 6-7. The Michigan Court of Appeals missed the essential point here: the *facts* necessary to resolve the question whether the magistrate was misled by the

---

[5] For that matter, the People *never* argued that Robertson's two stale arrests supported the magistrate's probable cause finding.

affiant's deliberately or recklessly false statements had not been presented. Reliance on *Houston* was therefore clearly misplaced.

In *Houston,* the defendant pleaded guilty to possession with intent to deliver less than 50 grams of cocaine. He was sentenced to lifetime probation and to a fine of $25,000 to reimburse the State for the cost of his incarceration in another case. On appeal, the defendant argued that the trial court could not order reimbursement to the State for the costs of incarceration in a related case as a condition of the lifetime probation sentence in the case at bar. After noting the defendant had not raised the issue below because the trial court's decision "came as some surprise," the Court stated the issue turned on statutory interpretation, then reached the merits. While vacating and remanding for resentencing, the Court held

> the absence of express authority under MCL § 771.3; MSA 28.1133, permitting reimbursement to be a condition of probation, coupled with the legislative scheme in the [Prisoner Reimbursement to the County Act], leads us to conclude that the Legislature did not intend the reimbursement of room and board to be a proper condition of probation.

Unlike *Houston*, this issue did not turn on the interpretation of a statute, but rather on an unresolved factual determination: Was the magistrate misled by the affiant's deliberately or recklessly false

statements? The Court of Appeals erred reversibly in its reading of *Houston*.

B. In Addition, the Good-Faith Exception Has No Application Because the Warrant Was Supported by Nothing More than a "Bare Bones" Affidavit.

The good-faith reliance exception is also precluded here because "the warrant application was supported by [nothing] more than a 'bare bones' affidavit." An affidavit that states suspicions, beliefs, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge, is a "bare bones" affidavit. *See Aguilar v. Texas,* 378 U.S. at 114.

The affidavit supporting the warrant merely recited the affiant's "suspicions, beliefs, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge." And as previously argued, paragraph two of the affidavit demonstrates, on its face, that the anonymous informant *had no* personal knowledge of illegal drug activity at the store. Further, evidence of Robertson's stale arrests did not rise to probable cause.

And despite conducting a three-day fixed surveillance, the affiant did not see any narcotics in the store and had no evidence that *anyone* had ever seen narcotics in the store. The affiant did not seize narcotics from any of the shoppers leaving the

clothing store and did not otherwise acquire any information to corroborate the anonymous informant's information. Furthermore, the mere corroboration of public facts and innocent information about the suspects does not establish the informant's reliability.

For these reasons, the warrant application was supported by nothing more than a "bare bones" affidavit.

The Colorado Supreme Court's decision in *People v. Randolph,* 4 P.3d 477 (2000) is illustrative on this point. In rejecting the contention that police-corroboration provided probable cause, the court stated:

> If only non-criminal activity is corroborated, the question whether probable cause exists focuses on 'the degree of suspicion that attaches to [the] particular types of corroborated non-criminal acts and whether the informant provides details which are not easily obtained.'
>
> * * *
>
> Driving two different cars during an unspecified time period is neither criminal activity nor inherently suspicious. Furthermore, this information does not include details that would be difficult to obtain.

See also United States v. Weaver, 99 F.3d 1372 (6th Cir. 1996). There, the affiant-detective possessed some information from a previously reliable informant

regarding possible criminal activity at Weaver's residence involving marijuana. However, other than an unrelated old conviction, the affiant had no prior personal knowledge of any unlawful activity by the defendant or at his residence.

Further, the affiant had no current personal knowledge of any connection between Weaver and marijuana possession or distribution, had not personally seen any marijuana at the Weaver-residence nor conducted any visual reconnaissance of the property to determine whether marijuana was likely to be present, and had only third-party hearsay information about a possible marijuana growing operation on the property.

The Sixth Circuit held that the good-faith exception to the exclusionary rule did not apply to a warrant to search the Weaver's residence because it was issued pursuant to an affidavit lacking probable cause.

C. In Failing to Challenge the Defense-Allegation That the Affidavit Contained False and Misleading Information, the People Forfeited this Claim on Appeal.

The People's actions and omissions essentially constituted a sandbagging of the trial court to create a potential appellate parachute to be used against an unfavorable ruling. Under such circumstances, this claim of error was abandoned on appeal. To hold

otherwise would contravene the longstanding rule against a party "harboring error as an appellate parachute." *Marshall Lasser, PC v. George,* 252 Mich.App. 104, 109 (2002).

The same obtains here. Although the People argued the validity of the search warrant on a number of grounds below, the claim that the search warrant affidavit did not contain any false information was argued for the first time on appeal. The People therefore forfeited this claim. *People v. Carines,* 460 Mich. 750, 763 n. 7 (1999) *citing United States v. Olano,* 507 U.S. 725, 733, 113 S.Ct. 1770 (1993) (forfeiture is the failure to make the timely assertion of a right; court disfavors consideration of unpreserved claims of error; litigants are encouraged to seek a fair and accurate disposition the first time around).

For all the above reasons, the People clearly did not meet the requirements to avoid forfeiture under the plain error rule. There is no "error" that is "plain" and that "affect[s] substantial rights." On the other hand, the decision to *reverse* the trial court's suppression order *does* seriously and adversely affect the fairness, integrity or public reputation of judicial proceedings because it gives a constitutional imprimatur to a search warrant that was supported by the affiant's deliberately or recklessly false information and a "bare bones" affidavit. It also rewards the People for piecemeal litigation and sandbagging.

See United States v. Young, 470 U.S. 1, 15-16, 105 S.Ct. 1038, 1046 (1985) (plain-error exception to the contemporaneous-objection rule is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result).

III. LESS THAN FIVE MINUTES AFTER OFFICER PACE CONDUCTED THE PRE-RAID SURVEILLANCE, HE RETURNED WITH HIS CREW TO EXECUTE THE SEARCH WARRANT. THE PRE-RAID SURVEILLANCE WAS INEXTRICABLY INTERTWINED WITH THE SEARCH WARRANT-EXECUTION AND WAS NOT SUFFICIENTLY DISTINGUISHABLE FROM THE ILLEGAL WARRANT TO BE PURGED OF ITS PRIMARY TAINT.

Officer Lindsay Pace testified that he went to Tommy Robertson's clothing store on December 7, 2006 for the purpose of conducting "[a] pre-raid surveillance." He left and, "probably less than five minutes" later, returned with his raiding crew for the execution of the search warrant. (T, 20, 25; 2/13/07). In executing a search warrant, sound police science would dictate conducting a pre-raid surveillance to properly assess what is to be anticipated on entering the premises to be searched. Considering that the warrant was executed in less than five minutes after the pre-raid surveillance, the surveillance was but the first step in the warrant's execution. The officer's testimony as to his observations during his

surveillance was therefore the fruit of the search that was already in progress.

In *Hudson v. Michigan,* 547 U.S. 586, 592, 126 S.Ct. 2159, 2163 (2006), this Court reaffirmed the long-established principle that exclusion is the proper sanction where there are no means sufficiently distinguishable to purge the objected-to evidence from the primary taint:

> **Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by** exploitation of that illegality or instead **by means sufficiently distinguishable to be purged of the primary taint.'** *Wong Sun v. United States,* 371 U.S. 471, 487-488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) (quoting J. Maguire, Evidence of Guilt 221 (1959) (emphasis added)).

Such is the case here. The pre-raid surveillance was inextricably intertwined with the search warrant-execution and was not sufficiently distinguishable from the illegal warrant to be purged of its primary taint. Without the inadmissible evidence, the prosecution in this case could not have gone forward.

CONCLUSION

Wherefore, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: September 1, 2009

2008 WL 5382919

UNPUBLISHED OPINION.
CHECK COURT RULES BEFORE CITING

UNPUBLISHED

Court of Appeals of Michigan.
PEOPLE of the State of Michigan,
Plaintiff-Appellant,
v.
Tracey L. ROBERTSON, Defendant-Appellee.
People of the State of Michigan, Plaintiff-Appellant,
v.
Tommy B. **Robertson**, Defendant-Appellee.
People of the State of Michigan, Plaintiff-Appellant,
v.
Nathaniel W. Jones, Defendant-Appellee.
Docket Nos. 280587, 280588, 280589.

Dec. 23, 2008.

Before: MURRAY, P.J., and MARKEY and WILDER, JJ.

PER CURIAM.

The prosecutor appeals by right from the circuit court orders dismissing the charges of felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b, against defendants Tracey L. Robertson (Docket No. 280587) and Nathaniel W. Jones (Docket No. 280589), and the charges of felon in possession of a firearm and felony-firearm against defendant Tommy B. Robertson (Docket No. 280589), following the grant of

defendants' motions to suppress evidence. We reverse and remand. These appeals have been decided without oral argument pursuant to MCR 7.214(E).

These cases arise out of the execution of a search warrant at a clothing store. Shortly before the warrant was executed, Officer Lindsay Pace entered the store to conduct "pre raid surveillance." He pretended he was shopping when he saw defendant Tommy Robertson, the storeowner, emerge from the rear of the store. Tommy Robertson removed a handgun from his waistband and handed it to defendant Jones. Jones put the gun in his waistband. Then, defendant Tracey Robertson approached Pace to help him with selecting shoes. As Tracey Robertson bent forward, Pace observed a handgun and a holster on his waistband.

Pace left the store and returned five minutes later with backup to execute the warrant that had been issued the previous day. Once inside, the officers retrieved two handguns-one from the ground by Jones feet and the other from underneath the display an officer saw Tracey Robertson place the gun. Defendants were arrested, charged, and bound over for trial.

On March 20, 2007, defendants moved to suppress the evidence. In granting the motion, the trial court opined that the officers failed to make a "substantial showing that a crime is taking place or illegal activity is taking place." The trial court then

dismissed the cases and entered orders of dismissal for all charges for each defendant.

On August 7, 2007, the prosecutor moved for reconsideration of the orders of dismissal, arguing that Pace had observed defendants in possession of guns while he was in the store before the search when it was open to the public and that those observations were independent of the search warrant. The trial court denied the motion. Plaintiff appealed by right the orders of dismissal in all actions. This Court consolidated the cases for purposes of appeal on September 26, 2007.

Plaintiff raises the same arguments in all three appeals. First, plaintiff argues that the trial court erred in quashing a search warrant where a substantial basis existed for the magistrate's finding of probable cause.

Generally, if evidence is unconstitutionally seized, it must be excluded from trial. Exclusion of improperly obtained evidence serves as a deterrent to police misconduct, protects the right to privacy, and preserves judicial integrity. *Terry v. Ohio,* 392 U.S. 1, 12-13, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). "It is settled law that probable cause to search must exist at the time the search warrant is issued and that probable cause exists when a person of reasonable caution would be justified in concluding that evidence of criminal conduct is in the stated place to be searched." *Russo, supra at* 606-607 (citations omitted). In other words "probable cause to issue a search

warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *People v. Kazmierczak,* 461 Mich. 411, 417-418, 605 N.W.2d 667 (2000).

Searches conducted pursuant to a search warrant are based on a magistrate's decision regarding probable cause and should be paid great deference. *Russo, supra* at 604, citing *Illinois v. Gates,* 462 U.S. 213, 236-237, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). "Affording deference to the magistrate's decision simply requires that reviewing courts ensure that there is a substantial basis for the magistrate's conclusion that there is a 'fair probability that contraband or evidence of a crime will be found in a particular place.'" *Id.* at 604, quoting *Gates, supra* at 238.

The affidavit in support of a search warrant may be based on information supplied to the affiant by another person. If the other person is not named, the affidavit must contain affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information provided and that the informant is credible or his information is reliable. MCL 780.653(b). The search warrant and underlying affidavit are to be read in a commonsense and realistic manner. *Russo, supra* at 604.

The affidavit at issue included information from an anonymous informant (AI). The AI stated that a

specific person was selling drugs from a particular location. The affiant then conducted an independent investigation and saw what appeared to be multiple sales of narcotics: people entered the premises, spoke to the person described by the AI, and, after waiting a few minutes, exchanged money for something that was not on display in the store. He then immediately left the store. The affiant indicated that the actions he observed were consistent with narcotics trafficking and corroborated the information supplied by the AI.

An officer's observation of drug trafficking activity during surveillance is sufficient to support a search warrant. See e.g., *People v. Grifin,* 235 Mich.App. 27, 42-43, 597 N.W.2d 176 (1999), overruled in part on other grounds by *People v. Thompson,* 477 Mich. 146, 148, 730 N.W.2d 708 (2007). Although the affidavit did not conclusively establish that the visitors obtained drugs from the seller, "the affidavit need not *prove* anything." *People v. Whitfield,* 461 Mich. 441, 445-446, 607 N.W.2d 61 (2000) (emphasis in original). It only has to provide a substantial basis for concluding there is a fair probability that contraband or evidence of a crime will be found in the stated place. *Whitfield, supra* at 445-446, 607 N.W.2d 61. Evidence from an informant that a specific person was selling drugs from a particular place, plus evidence of apparent narcotic transactions involving that person at that place corroborating observations of the informant, provides a substantial basis for concluding that drugs would be found at the place to be searched. *People v. Perry,*

463 Mich. 927, 620 N.W.2d 308 (2000). Therefore, the trial court erred in its determination that the affidavit was insufficient to establish probable cause.

Though defendants argue that the information in the affidavit was stale, that is not a separate consideration in the probable cause to search analysis. *People v. Sobczak-Obetts,* 253 Mich.App. 97, 108, 654 N.W.2d 337 (2002). Instead, time is but one factor in the probable cause determination to be weighed and balanced in light of the totality of circumstances, including whether the crime is a single instance or an ongoing pattern of violations, whether the inherent nature of the crime suggests that it is probably continuing, and whether the person committing the offense is likely to be promptly disposed of or keep the property. *Id.,* citing *Russo, supra* at 605-606 (citations omitted). Here, the information the informant provided, and the affiant's corroborating observations suggested an ongoing criminal enterprise, increasing the chance that contraband be present at any given time at the premises. Thus, considering the totality of circumstances, we find no delay undermined the magistrate's probable cause determination.

Plaintiff argued in the alternative that the trial court erred in suppressing the guns seized under the search warrant where the police acted in good faith to obtain and execute the warrant. Although the prosecution did not raise this issue below, it involves the application of the exclusionary rule, which is a question of law. *People v. Custer,* 465 Mich. 319, 326, 630 N.W.2d 870 (2001). "This Court may consider an

unpreserved question of law where the facts necessary for its resolution have been presented." *People v. Houston,* 237 Mich.App. 707, 712, 604 N.W.2d 706 (1999). Questions of law are reviewed de novo. *People v. Sierb,* 456 Mich. 519, 522, 581 N.W.2d 219 (1998)

When a law enforcement officer acts within the scope of, and relies in objective, good-faith on, a search warrant obtained from a judge or magistrate, the officer is acting as a reasonable officer would and should act in similar circumstances, thereby negating the deterrent effect of the exclusionary rule. *People v. Goldston,* 470 Mich. 523, 530-531, 682 N.W.2d 479 (2004). However, the good-faith exception to the exclusionary rule will not apply where "the issuing magistrate or judge is misled by information in the affidavit that the affiant either knew was false or would have known was false except for his reckless disregard of the truth," "where the magistrate wholly abandons his judicial role," or "where an officer relies on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.* at 531, 682 N.W.2d 479 (citations omitted).

There is simply no evidence that the police did not act in objective good faith when executing the warrant at issue. Specifically, the police officers' reliance on the magistrate's determination of probable cause and on the technical sufficiency of the search warrant was objectively reasonable. Moreover, the information in the affidavit was not false or misleading, and the issuing magistrate did not wholly

abandon his judicial role. Consequently, were there reason to hold the warrant was not based on probably cause, because the police acted in reasonable reliance on a presumptively valid search warrant, the good-faith exception to the exclusionary rule would support the execution of the warrant.

Finally, plaintiff argues that even without the evidence seized during the execution of the search warrant, there was sufficient evidence to proceed to trial on the charges of felon in possession of firearm, carrying a concealed weapon, and felony-firearm against defendants.

Because this issue was raised in the prosecution's motion for reconsideration, it is preserved for our review. See generally *People v. Connor,* 209 Mich.App. 419, 422, 531 N.W.2d 734 (1995). This Court reviews a trial court's decision to grant or deny a motion for reconsideration for an abuse of discretion. *Churchman v. Rickerson,* 240 Mich.App. 223, 233, 611 N.W.2d 333 (2000). An abuse of discretion occurs if the trial court's decision is outside the range of principled outcomes. *People v. Carnicom,* 272 Mich.App. 614, 617, 727 N.W.2d 399 (2006).

The exclusionary rule applies not only to evidence improperly seized during a search without a warrant but also to evidence subsequently seized pursuant to a warrant obtained as a result of an initial illegal search. Evidence in the latter category is excludable only if it would not have been obtained but for illegal government activity. *Segura v. United*

States, 468 U.S. 796, 815, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984).

Here, the search conducted pursuant to what the trial court determined an invalid search warrant was the basis for excluding the evidence and dismissing the charges. But, even without the evidence seized during the execution of the search warrant, the prosecution possessed sufficient evidence to proceed to trial on the firearm charges. Specifically, while lawfully on the premises, prior to and independent of the search, Officer Pace observed each defendant in possession of a handgun. Accordingly, the trial court erred in denying 'the prosecution's motion for reconsideration.

We reverse and remand for reinstatement of the charges against defendants. We do not retain jurisdiction.

STATE OF MICHIGAN THIRD JUDICIAL COURT CRIMINAL DIVISION	ORDER OF ACQUITTAL/ DISMISSAL OR REMAND	CASE NO. 07-5230

ORI MI-

Court Address

Court Telephone Number

THE PEOPLE OF ☒ The State of Michigan ☐ _____	v	Defendant's name, address, and telephone no. Tommy Robertson

CTN	SID	DOB

Count	CRIME	CHARGE CODE(S) MCL citation/ PACC Code
I	Fa Poss By Felon	
II	Felony Firearm	

IT IS ORDERED:

☐ 1. The case is dismissed on the motion of the court
- ☐ with
- ☐ without prejudice.

☒ 2. The defendant's motion for dismissal is granted
- ☒ with
- ☐ without prejudice and the case is dismissed.

☐ 3. The defendant's motion for dismissal is granted in part
☐ with
☐ without prejudice and the following charge(s) is/are dismissed:_____
_____

☐ 4. Defendant is acquitted on all charge(s) in this case after trial by
☐ judge
☐ jury.

☐ 5. Defendant is acquitted after trial by
☐ judge
☐ jury only on the following charge(s):
_____
_____

☐ 6. Defendant shall be immediately discharged from confinement in this case.

☒ 7. Bond is canceled and shall be returned after costs are deducted.

☐ 8. Bond/bail is continued on the remaining charge(s).

☐ 9. The case is remanded to the ____ district court for further proceedings for the following reasons:

08/03/07 /s/ Cynthia Gray Hathaway P40096
Date Judge Bar No.

If item 1, 2, or 4 is checked, the clerk of the court shall send a photocopy of this order to the Michigan State Police Central Records Division to create a

criminal history record as required under MCL 769.16a.

STATE OF MICHIGAN Third Judicial Circuit Court Criminal Division	ORDER DENYING/ GRANTING MOTION	Case No. 07-5230

THE PEOPLE OF THE STATE OF MICHIGAN

vs.

Tommy Robertson
Defendant

At a Session of Said Court held in The Frank Murphy Hall of Justice at Detroit in Wayne County on Aug. 24, 2007

PRESENT:
Honorable HON. CYNTHIA GRAY HATHAWAY
Judge

A Motion for: People Motion for Reconsideration having been filed; and

---

the People having filed and answer in opposition; and the Court having reviewed the briefs and records in the Cause and being fully advised in the premises;

IT IS ORDERED THAT the Motion for _____ _____ be and is hereby ☒ denied ☐ granted.

/s/ C G Hathaway P40096
Judge

765 N.W.2d 614

Supreme Court of Michigan.
PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Tommy B. **ROBERTSON,** Defendant-Appellant.
Docket No. 138235.
COA No. 280588.

June 3, 2009.

Prior report: 2008 WL 5382919.

Order

On order of the Court, the application for leave to appeal the December 23, 2008 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

MARILYN J. KELLY, C.J., and MICHAEL F. CAVANAGH, J., would grant leave to appeal.

US Const, Am IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*****AMENDED TO REFLECT CORRECT PROCEEDING DATE OF 8-3-07*****

STATE OF MICHIGAN

IN THE THIRD JUDICIAL CIRCUIT COURT
FOR THE COUNTY OF WAYNE

CRIMINAL DIVISION

PEOPLE OF THE STATE
OF MICHIGAN

v

ROBERTSON: Tracey	Case No. 075189
ROBERTSON: Tommy	Case No. 075230/078288
JONES: Nathaniel	Case No. 075189

Defendants. /

MOTION

BEFORE THE HONORABLE
CYNTHIA GRAY HATHAWAY, JUDGE)
THIRD JUDICIAL CIRCUIT COURT
Detroit, Michigan – August 3, 2007

APPEARANCES:

For the People: MS. NICOLE JAMES (P58961)
WAYNE COUNTY
PROSECUTOR'S OFFICE
FRANK MURPHY HALL
OF JUSTICE
1441 St. Antoine Street
Detroit, MI 48226
(313) 224-2890

For the Defendant: (Tommy Robertson)	MR. ANTONIO D. TUDDLES (P64158) 315 Griswold, Suite 1509 Detroit, MI 48226 (313) 965-1457
For the Defendant: (Tommy Robertson)	MR. CHARLES LUSBY (P224861) 1343 East Fisher Fwy. Detroit, MI 48207 (313) 567-2977
For the Defendant: (Nathaniel Jones)	MR. WARREN HARRIS (P44199) 29777 Telegraph Road, Suite 2500 Southfield, MI 48034 (248) 357-4800
For the Defendant:	MR. THOMAS QUARTERMAN (P28616) PO Box 38449 Detroit, MI 48238 (313) 961-0808

GLENDA J. MERRITT, CSMR 6566
OFFICIAL COURT REPORTER

* * *

[8] involving narcotics certainly is not probable cause that three years later or two years later or one year later –

THE COURT: I agree with you on that.

MR. LUSBY: Thank you, your Honor.

THE COURT: And I grant that part of your motion too.

Mr. Quarterman said something interesting in his brief and motion.

He says there was no investigation, basically, of people going in and out of the store.

I mean, as I indicated, if it's a store open for business and selling clothes, the fact that the bags are large bags indicates to me that there's a good chance that there are clothes in those bags, in those large bags than drugs.

I mean, there may be drugs in there, but I haven't heard in drugs in big bags like that, described. as large bags, usually small bags.

But the fact is there is no investigation to substantiate any conclusion that drugs are being sold there.

Whether they are or not, there is no investigation to do that.

So, I think when you look at that case that indicates that there should be some substantial showing [9] that a crime is taking placing or illegal activity is taking place, that's not here.

There is no substantial showing of that here. So I'm going to quash the search warrant.

MR. LUSBY: Thank you, Judge.

MR. HARRIS: Thank you, your Honor.

MR. TUDDLES: Thank you, your Honor.

THE COURT: Like I said, I don't know how many of these people that relates to.

I know it relates to Mr. Tommy Robertson, but I don't know about the rest of them.

MR. LUSBY: Well, we're certain Mr. Tommy Robertson. And Mr. Tuddles and I certainly thank you.

MS. JAMES: Your Honor, I'm sure it applies to all three Defendants.

THE COURT: Now, who is involved with the Harper Woods matter?

MR. LUSBY: Mr. Robertson, Tommy Robertson.

THE COURT: Okay. By himself?

MR. LUSBY: That's correct.

THE COURT: Okay. All right. So, I'm dismissing against on that search warrant on those Defendants with prejudice.

MR. LUSBY: Thank you.

MR. HARRIS: Your Honor, the suppression of

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STATE OF MICHIGAN)ss **AFFIDAVIT FOR SEARCH WARRANT**

COUNTY OF WAYNE

The following facts are sworn to by affiant in support of the issuance of the Warrant:

1. Affiant is a duly sworn Police Officer with the City of Detroit Police Department and has been so employed for nineteen years. Affiant is currently assigned to the Narcotics Enforcement Division and has been so assigned for over 13 years. Affiant has received specialized training in various aspects of drug law enforcement and drug related asset investigations, including the identification, locating, seizure and forfeiture of proceeds derived from violations of narcotics laws. Affiant has been involved in numerous drug investigations as both a uniform and undercover officer. Affiant has attended classes and seminars dealing with the use, sale, manufacture, identification and distribution of controlled substances. Affiant has made undercover controlled purchases of cocaine, and marijuana on at least five occasions. Affiant is experienced in surveillance and the way in which narcotics are trafficked in the City of Detroit.

2. In the last week of this affidavit, Affiant received an anonymous phone call stating that drugs were being sold at 8552 Grand River. The caller stated that cars would pull up to the [sic] of the above location. The individuals would exit their cars and enter the front door of the business. The individuals would go

to the rear of the location and exchange large suns [sic] of money for unknown item [sic] without purchasing any item on display for sale in the store. The individuals would stay a short period of time and then leave the location. The caller states the above described seller has been selling narcotics for years and maybe involved in homicides in the City of Detroit.

3. On November 28, 2006, Affiant acting on the above information set up fixed surveillance at 8552 Grand River. Within [sic] thirty minutes period, affiant observed several individuals arrive, via different modes of travel, and enter the above location. The individuals would go to the rear of the location with the above sellers and stay a short time and then exit the location. Affiant observed seller #1 hand one of the individual [sic] a large blue plastic bag. The individual then left the location with the large blue plastic bag placing the bag inside a silver Cadillac. Affiant noticed that these individual [sic] made to [sic] purchase of items on display in the store. The individuals would then leave the area.

4. On November 29, 2006, Affiant and members of the western narcotic enforcement unit set up a fixed surveillance at 8552 Grand River and on this day, affiant observed several individuals arrive, via different modes of travel and enter the above location. The individuals would have a brief conversation with above sellers and then go to the rear of the location. The individuals would stay a short time and then would exit the location. On one occasion, Affiant

observed an Arabic male on foot walk to the above location and entered the front door having a brief conversation with both of the above sellers. Both sellers went to the rear of the location with the Arabic male. Seller #2 walked into a small room of the building and returned with a large green and white plastic bag. Seller #2 handed the green and white bag to the Arabic male. Affiant then observed the Arabic male walk west on Grand River to Heritage and placed the green and white bag in a white vehicle occupied by three black makes [sic]. These individual then left the area. Affiant noticed that the individuals made no purchase of items on display in the store.

5. On December 5th 2006, Affiant set up a fixed surveillance observing the same activity described above. Above. [sic] Affiant talk [sic] with anonymous source, who stated that above sellers only sell to customers that are known.

6. Affiant observed on all occasions both sellers standing in the front window of 8552 Grand River and that both sellers always go to rear of the location with individuals entering the location. Both sellers always had a brief conversation with individuals before going to the rear of the location.

7. Affiant check [sic] Narcotics Section data base which revealed that on August 1, 2005, a search warrant was executed by Detroit Police at 18437 Woodland, Haper [sic] Woods, Michigan. Tommie Robertson bm, date of birth [Date Of Birth Omitted] was found in possession of Cocaine, Heroin,

marijuana, one firearm, and $20,297.00 in proceeds. Tommie Robertson was arrested.

8. On January 31, 2005, a search warrant was executed by Detroit Police Narcotic Unit at 3227 W. Euclid in the City of Detroit. Tommie Robertson DOB: [Date Of Birth Omitted] [Home Address Omitted] was found in possession of marijuana and a large sum of United States Currency and was arrested.

9. On February 4, 2004, Detroit Police Narcotic Unit executed a search warrant at 4045 Gladstone in the City of Detroit. Tommie Robertson was found in possession of marijuana, narcotic proceeds, scale and two firearms and was arrested.

10. Further check of Detroit Police Narcotic Section data base revealed that 8500 Grand River has 224-dope complaint # A04-5592, on narcotic being sold from this location by (2) two black males approximately 40. This address is on the same building as 8552 Grand River where the store is located. These activity's [sic] coupled with the affiant's training and experience, is consistent with narcotic trafficking, in the City of Detroit.

11. A check of City County Records revealed that 8552 Grand River, Slicks Fashion Design and Novelties Store are [sic] register [sic] to Tommie Robertson.

12. Based on the above facts and surveillance at that location affiant has probable cause to believe that narcotic [sic] will be found at 8552 Grand River.

11. [sic] Affiant has been involved in numerous narcotic raids in the City of Detroit, in the overwhelming majority of these raids, illegal firearms were found used to protect the illegal narcotic trade, affiant seeks to remove the same.

Affiant s/ Lindsey Pace

Subscribed and sworn to before me and issued under my hand this 6th day of December 2006.

Approved: s/ _____
Assistant Prosecuting Attorney
12-6-06

s/ _____
Judge/Magistrate
36th District Court
Wayne County, MI

STATE OF MICHIGAN

)ss SEARCH WARRANT

COUNTY OF WAYNE

TO THE SHERIFF OR ANY PEACE OFFICER OF SAID COUNTY: Police Officer Lindsey Pace

Affiant, having sworn to an Affidavit for Search Warrant, and I having under oath examined affiant, am satisfied that probable cause exists:

THEREFORE IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, I COMMAND THAT YOU SEARCH THE FOLLOWING DESCRIBED PLACES:

The entire premises and curtilage known as 8552 Grand River, Slicks Fashion Design and Novelties store, which is described as a 2 story commercial building, purple bricks on the lower half, tan in color on the upper half located on the North side of Grand River, between Quincy and Heritage within the City of Detroit, County of Wayne, State of Michigan.

ALSO TO BE SEARCHED IS THE SELLER: #1 – **B-M/ DOB: [Date Of Birth Omitted], Name Tommie Robertson possible address [Home Address Omitted]**

#2 – BM aprx. 35 to 40 years old, 6', slim built, dark complexion.

And to seize, tabulate, and make return thereof according to law, the following property or items: All controlled substances, all moneys, books and records

used in connection with illegal narcotics trafficking, all equipment and supplies used in the manufacture, delivery, sale or use of controlled substances, all firearms used in connection with the above described activities, all items which prove ownership, occupancy, possession or control of the above premises, safes which may contain any of the above described items, and to search vehicles on the premises/ curtilage which are believed to be used in the transport, delivery and or storing of narcotics.

Affiant s/ Lindsey Pace

Subscribed and sworn to before me and issued under my hand this 6th day of December 2006.

Approved: s/ _____
Assistant Prosecuting Attorney
12-6-06

s/ _____
Judge/Magistrate
36th District Court
Wayne County, MI